86-250

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

GEORGE BOWEN, Warden, and
THE ATTORNEY GENERAL OF ALABAMA,

Petitioners

vs.

HARRY PEOPLES,

Respondent

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEALS

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ATTORNEYS FOR PETITIONER

## QUESTION PRESENTED

Did the Eleventh Circuit err in holding that Strickland v. Washington, 446 U.S. 668 (1984), requires the granting of the habeas corpus writ petitioned for in this case?

## PARTIES

The caption contains the names of all parties to the proceedings in the courts below except that the State of Alabama was a named party in all proceedings in state courts.

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## OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals, Peoples v. State, 415 So. 2d 1230 (1982), affirming respondent's conviction but remanding the case to the state trial court for proper sentencing is reproduced as Appendix A.[1]

2. The opinion of the Alabama Court of Criminal Appeals, Peoples v. State, 421 So. 2d 1383 (1982) affirming respondent's life sentence after remandment to the trial court for resentencing is reproduced as Appendix B.

3. The Report and Recommendation of the Magistrate of the United States District Court for the Middle District of Alabama recommending the petition for

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[1]The appendix to this petition is separately bound pursuant to Rule 21.1(k).

writ of habeas corpus be dismissed is not reported but is reproduced as Appendix C.

4. The opinion of the United States Eleventh Circuit Court of Appeals, Peoples v. Bowen, 791 F. 2d 861 (11th Cir. 1986), reversing the district court, holding respondent's state appellate counsel ineffective, and directing that the writ issue is reproduced as Appendix D.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit which is sought to be reviewed was issued June 17, 1986. Peoples v. Bowen, 791 F. 2d 861 (11th Cir. 1986). See Appendix C. This petition is filed within sixty (60) days of the date of the said judgment as permitted by Rule 20.1 and Rule 20.4.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

## STATEMENT OF THE CASE

### The Facts

The Eleventh Circuit Court of Appeals found the following facts:

> Peoples, an Alabama state prisoner, was convicted May 21, 1981 of murder, pursuant to Alabama Code §13A-6-2 (Suppl. 1977). The court continued the case for sentencing to June 12, 1981, noting that the probation staff was not available. On June 12 Peoples was sentenced to 20 years. Immediately upon

imposition of sentence trial counsel withdrew and, on July 31, 1981, Donald Harrison was appointed for appeal. The trial transcript was not completed until March 5, 1982, and petitioner's brief to the Alabama Court of Criminal Appeals was filed April 9, 1982. The only issues raised were sufficiency of the evidence and admissibility of a single piece of evidence, neither of which had been properly preserved at trial. The court, Peoples v. State, 415 So. 2d 1230 (Ala. Crim. App. 1982), summarily rejected both arguments on the ground nothing was presented to it for

review and affirmed the guilt phase of the trial. Then, on its own motion, the court took up the matter of the sentence, an issue not raised by either party. It noted the requirements of the Alabama Habitual Felony Offender Act, Alabama Code §13A-5-9(b)(3) (Supp. 1981), which provides:

> (b) In all cases when it is shown that a criminal defendant has been previously convicted of any two felonies and after such convictions has committed another felony, he must be punished as follows:
>
> * * * * * *
>
> (3) On conviction of a Class A felony, he must be punished by imprisonment for life or for any term of not less than 99 years.

Murder is a class A felony.

The court referred to prior case law holding that once a defendant admits prior felony convictions they are proved for purposes of the HFOA, and it noted that in his trial testimony Peoples had admitted to two prior felonies, grand larceny and a heroin drug charge. Having laid this predicate, the court remanded the case to the trial court with instructions to conduct a sentencing hearing and apply HFOA. (footnote omitted).

On remand the trial judge resentenced Peoples to life. A transcript of the resentencing proceeding reveals that the following occurred. The

state filed a motion with the trial court to invoke the HFOA and filed certified copies of two prior convictions. Peoples' counsel argued strenuously against resentencing. He noted that Peoples had testified at his trial and that the state had an opportunity to present evidence concerning his prior convictions but did not. Counsel argued that the trial court was in a better position to establish a sentence than an appellate court, and that the court of criminal appeals erred in reaching an issue not presented by either side. The trial judge responded that he was under "direct orders" of

the court of criminal appeals to impose a sentence as directed by that court and, therefore, he imposed life imprisonment.

Pursuant to the mandate of the court of criminal appeals, a transcript of the resentencing proceedings was forwarded to it and the court affirmed. (791 F. 2d 861, 863-864).

## Proceedings Below

In addition to the state court proceedings detailed in just-quoted findings of fact by the Eleventh Circuit the remaining proceedings below are simply that after exhausting state remedies, respondent proceeded to bring a petition for writ of habeas corpus in the district court for the middle district of Alabama under 28 U.S.C. §2254 alleging ineffective assistance of state appellate counsel. The district court denied the writ, respondent appealed, and the Eleventh Circuit issued the judgment reversing the district court and which is under attack in this petition for writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### The Court Below Misconstrues Strickland v. Washington to Require a Finding of Ineffective Assistance of Counsel in This Case Although There Has Been No Showing That The Allegedly Professional Error By State Appellate Counsel Resulted in Fundamental Unfairness to the Defendant.

The standard for finding prejudice because of a professional error by counsel as articulated by this Court in Strickland v. Washington, 446 U.S. 668 (1984), is:

> ***The defendant must show that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> (466 U.S. at 694)

However, the above-quoted test was formulated in the following context:

> ***When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence...the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> (466 U.S. at 695.

Thus, it is clear the present case is on its facts clearly distinguishable from Strickland, and the court below erred in its application thereof.

In Strickland, the concern is that a professional error undermines confidence in the outcome, i.e., it is reasonably probable the defendant should not have been found guilty or it is reasonably probable the defendant should not have been given the death sentence. In either

situation -- the finding of guilt or the determining that the defendant should receive the death sentence -- there is a concern some factual consideration improperly was or was not before the factfinder or was or was not before the sentencer because of a professional error. This type professional error "undermine[s] confidence in the outcome." That is, in hindsight a reviewer can look at what happened and not be confident the right result was obtained or that injustice has not resulted.

None of the above considerations apply in the instant case. There is absolutely no question the life sentence given the defendant here upon resentencing was the right and just result. No one can look at defendant's sentence and not be confident that it was the proper sentence. It is undisputed in

this case that the initial 20-year sentence was erroneous and that the life sentence given defendant upon resentencing was the proper one. In fact, the finding by the Court below of a professional error on the part of the defendant's state appellate counsel is squarely bottomed on its finding that Alabama law was clearly settled and that under Alabama law the life sentence handed down upon resentencing was mandated under the facts at trial, i.e., the defendant had testified at trial and had admitted on the stand to two prior felonies, both of which were clearly felonies for purposes of Alabama's Habitual Felony Offender Act.

Because defendant in the end received the sentence clearly mandated by Alabama law, and there is no dispute about this, the petitioners contend it

cannot be said there is any lack of confidence in the defendant's sentence because of a professional error on the part of his state appellate counsel. "Prejudice" is detriment that results from an unfair judgment. United States v. McWilliams, 54 F. Supp. 791, 793 (D. C. 1944). In fact, allowing the defendant to escape with an erroneous 20-year sentence when a life sentence was clearly mandated by state law simply because the trial court made a legal error which was later discovered, for whatever reason, and was corrected would seem to undermine confidence in the fairness of the whole judicial system.

## CONCLUSION

Because any professional error on the part of the defendant's state appellate counsel did not result in fundamental unfairness to the defendant and does not undermine confidence in the outcome of the defendant's sentencing, the Court below erred in holding that Strickland v. Washington mandates a granting of the writ of habeas corpus, and the judgment of the Court below is due to be reversed.

Respectfully submitted,

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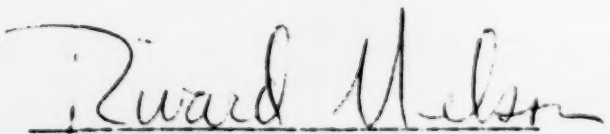
## CERTIFICATE OF SERVICE

I, Rivard D. Melson, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 15th day of August, 1986, I did serve three (3) copies of this petition and three (3) copies of the accompanying appendix on the Respondent by placing same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Hon. Margaret L. Givhan
Attorney at Law
25 Washington Avenue, Suite 500
Montgomery, Alabama 36104

I further certify I have served all parties required to be served.



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